IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 62

UNITED STATES OF AMERICA,

Appellant,

v.

BAUSCH & LOMB OPTICAL COMPANY, M. HERBERT EISENHART, BEN A. RAMAKER, JOSEPH F. TAYLOR, SOFT-LITE LENS COMPANY, INC., NATHANIEL SINGER and R. G. LANDIS,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES BAUSCH & LOMB OPTICAL COMPANY, M. HERBERT EISENHART, BEN A. RAMAKER AND JOSEPH F. TAYLOR

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OPINION BELOW

The opinion of the District Court (R. 19) is reported in 45 F. Supp. 387.

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*These appellees are sometimes referred to herein as the "Bausch & Lomb defendants" and the corporate defendant as "Bausch & Lomb". The other appellees are referred to as the "Soft-Lite defendants", Soft-Lite Lens Company, Inc. and a predecessor company as "Soft-Lite".

JURISDICTION

The final judgment of the District Court was entered February 1, 1943 (R. 60). The petition for appeal was filed in and granted by the District Court April 1, 1943 (R. 65).

Appellant invokes the jurisdiction of this Court under Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. § 29) and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. § 345).

QUESTION PRESENTED

These appellees are concerned with only one of the questions presented on this appeal (Question (3), Govt. Br. pp. 2-3):

> "Whether the agreement by Bausch & Lomb Optical Company not to sell pink-tinted glass or lenses to any competitor of Soft-Lite and not to compete with Soft-Lite in the marketing of any pink-tinted lens unreasonably restrains interstate commerce, in violation of Section 1 of the Sherman Act."

STATUTES INVOLVED

Act of July 2, 1890, known as the Sherman Act, Sections 1, 3, and 4, as amended (26 Stat. 209, 36 Stat. 1167, 50 Stat. 693, 15 U. S. C. §§ 1, 3 and 4) (Appendix, pp. 37-8).

STATEMENT

The complaint (R. 3) charged in substance that the Bausch & Lomb and Soft-Lite defendants had conspired

to restrain trade and commerce in violation of Sections 1 and 3 of the Sherman Anti-Trust Act by limiting the distribution of "Soft-Lite" pink-tinted lenses* to certain selected wholesalers and retailers and requiring them to maintain arbitrary and unreasonable prices.**

Bausch & Lomb was alleged to have been a party to this conspiracy because as a part thereof it had entered into a manufacturing agreement to supply pink-tinted lenses exclusively to Soft-Lite, and also because it had participated directly and through its "affiliated and controlled branches" in the establishment and maintenance of the Soft-Lite distribution system. Thus the charge against the Bausch & Lomb defendants was participation in the alleged conspiracy with respect to the distribution system. The manufacturing agreement between Soft-Lite and Bausch & Lomb was involved only as an alleged part of the distribution system; no separate attack upon it was made in the complaint. However, at the trial, Government counsel also attacked the manufacturing arrangement standing alone (R. 199), and the trial court considered it in both aspects (R. 33). Neither in the complaint nor at the trial was there any claim of monopoly or conspiracy to monopolize and the trial court found that there was no monopoly (R. 58).

The District Court rendered an extensive opinion (R. 19) and made detailed findings and conclusions (R. 52), after full presentation of proposed findings (R. 38). It held that the Soft-Lite distribution system constituted an

*The term "lenses" is used in this brief to refer generally to all forms sold by Soft-Lite, from rough blanks to finished lenses.

**The distribution system is referred to herein for convenience as "the Soft-Lite distribution system".

agreement, combination and conspiracy between the Soft-Lite defendants and Soft-Lite's designated wholesalers and licensed retailers who participated in the distribution system in violation of Sections 1 and 3 of the Sherman Act, and granted an injunction against the Soft-Lite defendants (R. 58-9, 61).

The District Court weighed the evidence, which was not without some conflict, and found that the Bausch & Lomb defendants had played no part in the establishment, operation or maintenance of the Soft-Lite distribution system (Finding 32, R. 58) and that they had not agreed, combined and conspired among themselves or with the other defendants as alleged in the complaint (Finding 36, R. 58), and accordingly entered judgment dismissing the complaint on the merits against the Bausch & Lomb defendants (Judgment, par. 12, R. 64).

The District Court further found that the exclusive manufacturing agreement, originally made in 1924, had no connection with the Soft-Lite distribution system, and that when it was entered into, the parties did not envision the Soft-Lite distribution system which was established in 1933 (Finding 32, R. 58). It found that this agreement had a legitimate business basis and that its restrictive provisions were for Soft-Lite's protection (R. 58). In these circumstances the Court held the agreement valid, not in violation of the Sherman Act, and declined to disturb it (R. 59).

Upon this appeal the Government has abandoned any claim that Bausch & Lomb was a party to the conspiracy involving the Soft-Lite distribution system. Assignments of error designed to challenge the findings and conclusions of the trial court upon this subject are not now urged. Despite occasional reference in the Government's brief to

fragments of the evidence offered at the trial on the conspiracy issue and fully covered by the Court's findings and conclusions, the failure of Appellant's brief to seek to overturn the findings on this subject limits this appeal, so far as these appellees are concerned, to the single question of the validity of the manufacturing agreement (Govt. Br., pp. 2-3, 22-23). Accordingly, it is necessary only to advert to some of the findings and evidence which may be germane to that subject.

Bausch & Lomb Optical Company is a leading manufacturer of scientific instruments and equipment and optical goods of many kinds, including lenses and ophthalmic glass for lenses. In 1924 Bausch & Lomb agreed to make pink-tinted lenses for Soft-Lite Company and not to sell pink-tinted glass or lenses to anyone else (Finding 8, R. 53; Govt. Exs. 2, 2A, R. 638, 95), reserving, however, full freedom of action as to all other types of optical glass, including that in other tints (Govt. Ex. 3,* R. 639-40, 99; Deft. Ex. Q, R. 987, 528; R. 527-8). On Soft-Lite's part the business motive for this agreement was to assure a supply of high quality product from a highly regarded domestic source; the motive of Bausch & Lomb was to secure a prospectively increasing market for its manufacture (Finding 33, R. 58). The restriction was for Soft-Lite's protection (R. 35). Soft-Lite's purchases have steadily increased; both parties have realized their objectives (R. 87-9; Finding 10, R. 53-4). As Soft-Lite's sales have increased, both the number of its competitors and the volume of their business have likewise increased (R. 483, 541; Govt. Ex. 207, R. 955, 629; Finding 34, R. 58).

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*This reservation is explicit in Govt. Ex. 3, although it is omitted from the Government's summary (Govt. Br. p. 9).

The unchallenged findings establish that this case involves no monopoly and that no competitor of Soft-Lite had any difficulty in obtaining ample glass and lenses to provide the most active competition (Findings 11, 12, 34, R. 54, 58). There is intense competition not only between tinted lenses of various manufacturers but also with untinted lenses (Finding 12, R. 54). There is no evidence in the record which would support a finding that the exclusive manufacturing arrangement worked injury to or handicapped any competitor, prevented or restrained any competitor from fullest competition, or in any way operated to the detriment of the public.

Soft-Lite and its predecessor, Optical Service Company, have always sold the Soft-Lite lenses purchased from Bausch & Lomb entirely to wholesale customers selected by them (R. 81-2, 123-4, 129-30, 221).

The only position Bausch & Lomb has ever occupied with respect to Soft-Lite lenses is that of manufacturer and vendor of the pink-tinted glass and lenses which it furnishes to Soft-Lite (R. 476). The relation of Soft-Lite and Bausch & Lomb is that of buyer and seller, Soft-Lite obtaining complete title from Bausch & Lomb (Finding 13, R. 54). The details of dealings between the companies, some of which are rather inadequately summarized in the Government's brief, are set forth in the findings. Since, as the court below found, these were quite innocuous and wholly insufficient to connect Bausch & Lomb or the manufacturing arrangement with the alleged conspiracy, and as those findings are not now challenged, it is unnecessary to consider them here.

Our sole concern in this brief is with the one claim now presented by the Government with respect to these appellees, that the court below should have enjoined and, indeed,

should have granted still more drastic and unprecedented relief against the manufacturing agreement which it found to be valid.

SUMMARY OF ARGUMENT

I

The District Court correctly held that the manufacturing agreement between Bausch & Lomb and Soft-Lite is valid. The restriction on Bausch & Lomb, included for Soft-Lite's protection, was merely ancillary to provision for a satisfactory source of supply. Such exclusive arrangements are universally upheld where, as here, no monopoly is involved. The restraint was reasonable and did not affect adversely the interests of competitors or the public. The agreement cannot be regarded as unreasonable even if others, less prudent, might have been willing to deal without protection. The Government's claim that the Court should cure an alleged legislative omission is addressed to the wrong forum. As monopoly is absent and competitors were able to obtain their full requirements elsewhere, Bausch & Lomb cannot be compelled to sell to Soft-Lite's competitors. The agreement, valid when made, did not drift into invalidity when Soft-Lite's business prospered.

As the findings below that Bausch & Lomb had no connection with the illegal distribution conspiracy are not challenged, those findings must be accepted and evidence upon that subject cannot be considered on this appeal.

II

The incomplete selections from evidence offered at the trial to connect Bausch & Lomb with the distribution conspiracy should not now be considered, but if considered, they do not affect the correctness of the decision below that the manufacturing agreement is valid.

POINT I

THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE SOFT-LITE–BAUSCH & LOMB MANUFACTURING AGREEMENT IS VALID.

The trial court held that the exclusive manufacturing agreement between Bausch & Lomb and Soft-Lite formed no part of the Soft-Lite licensing and distribution system (Conclusion 7, R. 59), that its restraints were ancillary to a proper business arrangement and were therefore valid, and, accordingly, declined to interfere with it. No claim is now pressed that Bausch & Lomb was involved in the distribution conspiracy, and here the sole question presented is whether the agreement itself violated the Sherman Act.

The circumstances under which the manufacturing agreement was made, amply set forth in the findings and evidence,* show that it was merely a natural outgrowth of the business situation of the parties and that it was "developed through arm's length negotiations" (45 F. Supp. 391, R. 22). Made in 1924, it was found not to have had (and could not have had) any possible relationship to the distribution system devised by Soft-Lite alone in 1933 (Finding 32, R. 58).

After a preliminary period of a few months during which Bausch & Lomb ground lenses from Soft-Lite's imported glass which was of poor quality, Bausch & Lomb offered to manufacture glass and lenses for Soft-Lite. Soft-Lite asked for assurance that Bausch & Lomb would not, after Soft-Lite's efforts had aroused public demand for

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*See R. 52-8, 86-8, 96-8, 286, 460-66, 473-5.

pink-tinted lenses, move into the same field and compete with its customer (R. 466). Soft-Lite was motivated by the need for a dependable supply of lenses of the highest quality, which Bausch & Lomb could manufacture for it; Bausch & Lomb obtained a new outlet for its manufacture. While Bausch & Lomb had manufactured and sold other tints and untinted lenses, it had not previously manufactured and sold pink-tinted glass. At this time Soft-Lite was a small business, commanding chiefly the energy of its proprietors. It contemplated an active and expensive promotional campaign, to be carried out on a national basis, which it hoped would change its product from one of the many tinted lenses on the market to an individualized article in great public demand. Ordinary prudence indicated that it should have proper assurances for its future protection (see 45 F. Supp. 398, R. 35).

Bausch & Lomb had an equally natural and legitimate interest in the arrangement. Being already engaged in the manufacture of numerous tinted lenses (Govt. Ex. 3, R. 639, 99), Bausch & Lomb understood the possibilities and the limitations of that field. When the opportunity came to expand its output by adding pink-tinted lenses, apparently it felt that the best way to dispose of this part of its manufacture was to sell to Soft-Lite, which had the advantage of the established Soft-Lite trade name and contacts with the pink lens market; and to leave to Soft-Lite the promotion of this particular tint. Soft-Lite's promotional efforts have been extensive.*

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*Soft-Lite has spent, solely in the promotion of Soft-Lite lenses, nearly $2,000,000 in the period from 1929 through June, 1941 (R. 532; Deft. Ex. T, R. 997, 531); all of its salesmen are on a salary basis and sell no other product (R. 456). Bausch & Lomb has never contributed any part of the Soft-Lite promotional expense (R. 532).

In making the agreement the parties were thus moved solely by proper considerations of commercial self-interest. The purchaser was obtaining, as an incident of purchase, protection against competition of a well-known manufacturer with the very product purchased from it, competition which would or might destroy the value of the good-will built up after the purchases. The seller was obtaining a new market, it was agreeing not to compete with its customer in a field where it had not competed before. As a consequence, the public got a new article of commerce of domestic manufacture, new competition came into the field. Competitors and the sales of their products multiplied (R. 483, 541; Govt. Ex. 207, R. 955, 629; Finding 34, R. 58).

In framing the question presented—whether the restrictive provision in the manufacturing agreement "unreasonably restrains interstate commerce"—the Government recognizes, as did the trial court (45 F. Supp. 398, R. 34-5), that the agreement here in question is one of those restraints which are not illegal unless unreasonable, as distinct from the class of restraints which may be illegal *per se* (45 F. Supp. 395-6, R. 29-30).

The sole question is the reasonableness of the restriction. The rule of reason (*Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911)) is so familiar from constant application that exegesis here would be presumptuous. And, as the court below observed, "In determining whether a restraint is unreasonable the guidance of the classic opinion in *United States* v. *Addyston Pipe & Steel Co.*, 6 Cir., 1898, 85 F. 271, 46 L. R. A. 122, affirmed 175 U. S. 211, 20 S. Ct. 96, 44 L. Ed. 136, is still available" (45 F. Supp. 398, R. 34).

The validity of such exclusive arrangements is generally recognized. The *Restatement of the Law of Contracts*

(American Law Institute), in enumerating instances of reasonable restraints which are legal and proper, includes the following:

> "§ 516. *Instances of Reasonable Restraints.* The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly:
>
> * * * * *
>
> (e) A bargain to deal exclusively with another; * * *"

Since there is no issue of monopoly in this case, the exception does not apply and the manufacturing agreement is squarely within the general rule.

Numerous cases have recognized the validity of contracts for exclusive dealing. *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933); *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923); *Moon Motor Car Co. of N. Y.* v. *Moon Motor Car Co.*, 29 F. (2d) 3 (C. C. A. 2d, 1928); *Kelly-Springfield Tire Co.* v. *Bobo*, 4 F. (2d) 71 (C. C. A. 9th, 1925), *cert. denied*, 268 U. S. 694; *Carter-Crume Co.* v. *Peurrung*, 86 Fed. 439 (C. C. A. 6th, 1898); *Great Western Distillery Products* v. *John A. Wathen Distillery Co.*, 10 Cal. (2d) 442, 74 P. (2d) 745 (1937); *New York Bank Note Co.* v. *Kidder Press Co.*, 192 Mass. 391, 78 N. E. 463 (1906); *Southwest Kansas Oil & Gas Co.* v. *Argus Pipe Line Co.*, 141 Kan. 287, 39 P. (2d) 906 (1935); *American Sand & Gravel Co.* v. *Chicago Gravel Co.*, 184 Ill. App. 509 (1914); *Heimbuecher* v. *Goff, Horner & Co.*, 119 Ill. App. 373 (1905); *Over* v. *Byram Foundry Co.*, 37 Ind. App. 452, 77 N. E. 302 (1906); *Excelsior Quilting Co.* v. *Creter*, 36 Misc. 698, 74 N. Y. Supp. 361 (Sup. Ct. N. Y. Co. 1902);

Blauner v. *Williams Co.*, 36 Misc. 173, 73 N. Y. Supp. 165 (Sup. Ct. N. Y. Co. 1901); *English Hop Growers* v. *Dering*, [1928] 2 K. B. 174. And the familiar "requirements contract" is not without helpful analogy. *Match Corporation of America* v. *Acme Match Corporation*, 285 Ill. App. 197, 1 N. E. (2d) 867 (1936); see *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353 (1931).

Furthermore, it has been pointed out that an agreement for exclusive dealing such as that here under consideration is analogous to the familiar covenant by the vendor of a business not to compete and is likewise valid. *Stemmerman* v. *Kelly*, 150 App. Div. 735, 738, 135 N. Y. Supp. 827, 829 (1st Dept. 1912), *aff'd*, 220 N. Y. 756.

There is little in substance to distinguish the transaction involved here from the sale by Bausch & Lomb to Soft-Lite of the pink-tinted lens portion of its business. If that had been the form, it is perfectly clear that an incidental covenant not to compete would be valid. *Hall Mfg. Co.* v. *Western Steel & Iron Works*, 227 Fed. 588 (C. C. A. 7th, 1915); see *Thoms* v. *Sutherland*, 52 F. (2d) 592 (C. C. A. 3rd, 1931). It was entirely within the rights of Bausch & Lomb to choose instead this method of expanding the market for its manufactures. The form is unimportant, the propriety of protection remains the same. The basic principle set forth in *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), recognizing the right of a vendor to sell to such persons and upon such conditions as he may choose, is still fully recognized (see 45 F. Supp. 396-7, R. 31-2). *Cf. Sorrentino* v. *Glen-Gery Shale Brick Corp.*, 46 F. Supp. 709 (E. D. Pa. 1942).

While for many years Bausch & Lomb has sold numerous tinted lenses, it never was a competitor of Soft-Lite in

the sale of pink-tinted lenses. Its manufacturing arrangement, originated in 1924, did not restrict competition; it advanced competition. Aside from the impetus given to competition in the pink-tinted lens business generally by Soft-Lite's activities (Finding 34,* R. 58), this arrangement actually facilitated the development of an entirely new domestic source of pink-tinted lenses. In the early cases which considered the validity of the now well-accepted covenant against competition by the vendor of a business, it was pointed out that the interests of the public were not prejudiced when one person was substituted for another so that the number of competitors remained unchanged.** Here, not only was there no reduction in the number of competitors, but a hitherto undeveloped source of domestic pink-tinted lenses was brought in through the manufacturing arrangement between Bausch & Lomb and Soft-Lite.

Such joint endeavor between independent units fulfilling the successive functions of production and distribution is not condemned by the Sherman Act. There can be no doubt that it would have been permissible for Soft-Lite to produce its own glass or for Bausch & Lomb to buy the good-will of Soft-Lite and then to manufacture and distribute "Soft-Lite" lenses to wholesalers in the regular course of its business just as it did other tinted lenses (Govt. Ex. 3, R. 639, 99). It was equally unobjectionable for the two companies, while retaining their corporate independence and diversity of interests and functions, to enter into

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" * * The success of Soft-Lite stimulated emulation and competition."

**_Williston on Contracts_ (Rev. ed, 1937), § 1641, pp. 4598-9; and see _Hall Mfg. Co._ v. _Western Steel & Iron Works, supra_, 593.

the manufacturing arrangement. *Appalachian Coals, Inc.* v. *United States, supra,* 376.

The restrictive provision, being ancillary to and considered necessary for carrying out this arrangement to enable Bausch & Lomb and Soft-Lite to exercise their respective functions of production and distribution, is perfectly proper. Recognizing this, the trial court commented as follows (45 F. Supp. 398-9, R. 35):

> "The arrangement, though not a partnership in legal form, is functionally a joint enterprise in which one will produce and the other market the commodity. *United States* v. *Addyston, supra,* at page 281."

While, in the earlier cases dealing with covenants not to compete, specific geographical and time limitations on the restrictions were thought to be determinative (see *Oregon Steam Navigation Co.* v. *Winsor,* 87 U. S. 64 (1873)), it is now clear that these are merely factors to be considered in determining the reasonableness of the limitations.* If the restriction is no broader than necessary to protect the main object of the agreement of which it is a part, the restriction is valid. Here, the main purpose of the agreement was an assured supply of a special article, the restriction marched with this purpose and went no further than necessary to prevent its frustration. It was only commensurate with the supply necessities of Soft-Lite's business, "full-grown and embryonic" (*Hall Mfg. Co.* v. *Western Steel & Iron Works, supra,* 593).

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*Cropper v. *Davis,* 243 Fed. 310 (C. C. A. 8th, 1917); *Prame* v. *Ferrell,* 166 Fed. 702 (C. C. A. 6th, 1909); *Hall Mfg. Co.* v. *Western Steel & Iron Works, supra; National Enameling & Stamping Co.* v. *Haberman,* 120 Fed. 415 (C. C. Conn., 1903).

The ultimate criterion in applying the test of reasonableness is whether or not the restriction in question goes beyond the legitimate needs of the parties and injures the interests of the public. In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940), in a footnote to the opinion by Mr. Justice Stone, it is indicated that the reasonableness of a restriction depends ultimately upon its actual effect on competitive conditions in the industry involved.* At pages 495-6, footnote 16, it is stated:

> "While it is impossible to consider all the anti-trust cases in this Court with reference to the question whether the acts condemned or condoned had a substantial effect on competition in the industry, nevertheless in most of them, particularly in the cases arising since the development of the 'rule of reason' in 1912, emphasis was placed on the 'competitive conditions in the industry.'"

The same footnote briefly considers a number of cases in which the rule of reason has been applied and where the practical effect of the restrictions involved upon competition in the industry have been evaluated in reaching a decision as to their validity.

When so examined, the correctness of the conclusion below is reinforced. The Government did not even allege, far less prove, that any competitor, wholesaler or retailer, who desired pink-tinted lenses was unable to get them.

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*Page 493, ftn. 15: "The history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that 'business competition' was the problem considered and that the act was designed to prevent restraints of trade which had a significant effect on such competition. * * *"

Indeed, quite the contrary was established.* (See Findings 11, 12, 34, R. 54, 58) (45 F. Supp. 398, R. 35).

The Government's arguments for reversal of the portion of the judgment with which we are concerned require but brief answer.

It is argued that Soft-Lite could have made its purchases from Bausch & Lomb without demanding the protection of the restriction, that the restriction was therefore unnecessary and so is unreasonable and invalid. However, it is not disputed that in 1924 Soft-Lite was a small business struggling with serious difficulties arising from uncertainties of supply and varying quality of the lenses it bought from many sources (R. 86-7, 462, 466). The court below found that the agreement which it made with Bausch & Lomb in an effort to end these difficulties by obtaining an assured domestic supply of uniformly high quality was reasonable and proper for Soft-Lite's protection. A contract without the assurances that Soft-Lite demanded and received would not have accomplished this purpose. Familiar arrangements thus deemed necessary for their proper protection by prudent businessmen cannot be struck down because others, less prudent, might have omitted to demand protection. The Sherman Act does not require that commerce be conducted as if the business world were one of fantasy.

It is also argued that the manufacturing agreement is illegal by analogy to Section 3 of the Clayton Act (15 U. S.

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*All the evidence points to intensive and ever-increasing competition among pink-tinted lenses and tinted lenses generally (R. 102-3, 145-6, 316-17, 451, 475, 483, 540-42; Deft. Ex. B, R. 958, 322). The only testimony on the subject from the wholesalers and retailers who appeared at the trial was that they have always been able to obtain tinted lenses without difficulty (Ramel, R. 321, Barnes, R. 418, Berliner, R. 514).

C. § 14). Government counsel recognize that by its terms and legislative history Section 3 of the Clayton Act is specifically limited to prohibiting sellers from placing designated restraints upon purchasers.* It is suggested that Congress would have prohibited purchasers from conditioning their purchases on restraints on sellers such as that here involved, if its attention had been directed to the problem and that the Court may now supply that legislative oversight. The omission as to vendors was not inadvertent; it was noted in Congress.** This argument appears to be addressed to the wrong forum and that, too, after Congress has shown no disposition to interfere.

It is also suggested that, although there were other sources from which competitors could and did obtain an adequate supply of pink-tinted glass, they were entitled to buy from Bausch & Lomb as well, and that the manufacturing arrangement is invalid because it prevented them from doing so. The fact that Soft-Lite advertised Bausch & Lomb manufacture is said to indicate that this was a "competitive advantage".*** The short answer would seem to

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*See the comments of Mr. Clayton (H. R. Rep. No. 627, 63d Cong., 2d Session (1914) 10-11).

**51 Cong. Rec. 9070, 9073 (1914): Representative Webb stated that the Act did not cover restrictions on a vendor. When the Clayton Act was amended in 1936, after Congress had had ample opportunity to observe recent business practices, it was not extended into the new field that the Government urges (see *Hearing before a Subcommittee of the Committee on the Judiciary* on H. R. 8442, 74th Cong., 2d Session (1936)).

***It has never been the law that one must forego proper efforts to promote sales and so conduct his business that no competitor will suffer any disadvantage or find it more difficult to compete. See *Federal Trade Comm.* v. *Curtis Publishing Co.*, *supra*, 582; *Federal Trade Comm.* v. *Paramount Famous-Lasky Corp.*, 57 F. (2d) 152, 157 (C. C. A. 2d, 1932).

be that this is not a monopoly case; there is neither charge, proof nor finding of monopoly; quite the opposite.* So there is no problem of opening up the supply market to give competitors a chance to obtain needed supplies. The market is open, as the great development of competition and imitation clearly establishes. The suggestion that because, following the exercise of Bausch & Lomb's undoubted right to choose Soft-Lite as sole customer and the right of Soft-Lite to choose Bausch & Lomb as sole supplier with proper protection, Soft-Lite has chosen to advertise the source of its product, the Sherman Act condemns the arrangement, seems to us fantastic. The Sherman Act leaves ample room for effective and fair competitive practices and does not denounce them when they have proved themselves to have value in the marketplace. The doctrine advanced turns the Act quite topsy-turvy. It would destroy the very values which the Sherman Act is supposed to protect. Absent monopoly, as it is absent here, no authority can be found for making Bausch & Lomb a public utility merely because its products are excellent and one of its customers finds it helpful in competition to say so. Good-will, built up through the advertisement of legitimate points of excellence and

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*Upon and in the face of this record, the Government's attempt to engage in a collateral skirmish (hardly even an attack) by quoting from an industrial manual (Govt. Br. p. 39, ftn.) seems peculiarly inappropriate. Omission of reference to manufacture of optical glass in the summary of the business of Pittsburgh Plate Glass Co. in such a manual can give rise to no inference at all, let alone an inference worthy of consideration here, which is contrary to charge, evidence, findings, and the living reality that the company involved is, as this record shows (R. 546-8), a large manufacturer of optical glass.

advantage, is a property right deemed worthy of legal protection, not destruction.*

Rather of a piece with this incongruous contention is the one that, even though the agreement were valid when made, it somehow became invalid when Soft-Lite's business became firmly established. This argument suggests that the agreement may have been reasonable and valid when Soft-Lite embarked on its purchases, but when the goodwill which the restriction was designed to assure against appropriation by the supplier had become worth protecting, the restriction became invalid by the very fact of fulfilling its purpose. Such an illogical conception of spasmodic reasonableness is, of course, unsupported by authority. If this restriction was valid when made, as we contend, it is because it was a reasonable protection against loss to Soft-Lite of the advantages which its efforts might thereafter create. Its importance to Soft-Lite continued; indeed, it increased as promotion and investment progressed. To strike it down when it is serving the very purpose which was reasonable in the beginning would mock a rule based on reason. No public interest requires or justifies so destructive a result. Absent monopoly, neither size, success nor the rewards of efficiency, in enterprises far more extensive than Soft-Lite, have been regarded as appropriate grounds for fragmentation or destruction under the Sherman Act. *Cf. United States* v. *International Harvester Co.*, 274 U. S. 693, 708

**Nu-Enamel Corp.* v. *Armstrong Paint & Varnish Works*, 95 F. (2d) 448 (C. C. A. 7th, 1938), *aff'd*, 305 U. S. 315; *American Safety Razor Corp.* v. *International Safety Razor Corp.*, 34 F. (2d) 445 (C. C. A. 3d, 1929); *Myles Standish Mfg. Co.* v. *Champion Spark Plug Co.*, 282 Fed. 961 (C. C. A. 8th, 1922).

(1927); *United States* v. *United States Steel Corp.*, 251 U. S. 417, 451 (1920); *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 53 (1918); *United States* v. *Aluminum Company of America*, 44 F. Supp. 97, 154 (S. D. N. Y. 1941).

The court below correctly held the agreement valid and free of any vice which would justify an injunction. There is no possible basis for accepting the view, now first advanced here, and not presented below, that at some indefinable point of time this agreement, untainted by any patina of subsequent illegal conduct, nevertheless became illegal when its protection became of real importance. The Sherman Act can hardly contemplate that lawful conduct can drift into illegality, at some time identified by no familiar landmarks, subject to civil and criminal penalties, merely because businessmen have been prudent and their business has prospered. Any such unforseeable result would turn the Act from a friend to a treacherous enemy of free enterprise.*

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*Since the trial court was plainly right in holding the manufacturing agreement valid, it is unnecessary to discuss at length the drastic relief suggested by the Government in the event that this Court should differ with the view of the court below on this subject. It may be noted, however, that such relief goes far beyond any which could properly be granted. The Government contends that this Court should not only direct an injunction against the agreement, but that it should forbid Bausch & Lomb from selling pink-tinted glass or lenses in interstate commerce at all until Bausch & Lomb agrees to sell to anyone ready to pay its price in cash. Such relief would deny to Bausch & Lomb its undoubted right to select its own customers (*Colgate* v. *United States*, *supra*), not only as to specific customers, but also as to classes of customers. Bausch & Lomb would not be able to follow its long established practice of selling to wholesalers, but would

In its statement of the case, and to some extent in its argument, the Government has referred to its versions of portions of the evidence, apparently on the theory that they tend to show connection between Bausch & Lomb and the Soft-Lite distribution system. We doubt that it is necessary to discuss these matters in this brief, but we have commented upon them in Point II hereof for the convenience of

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be required to sell to retailers and, indeed, to any person offering to pay cash, however unqualified he might be and however improper his purpose. We need only to suggest the confusion that would arise if Bausch & Lomb required its entire production for its own established markets or if one or more purchasers demanded the entire output—Bausch & Lomb might risk contempt of the decree if it could not fill all orders. Moreover, such a decree might compel Bausch & Lomb to sell, even up to its entire output, to a competitor who desired to trade on the good-will of Bausch & Lomb, or even if the avowed intention of the competitor was to injure the reputation of Bausch & Lomb by improper finishing or merchandising practices. Any such relief would thus have the most incongruous and destructive effects. The Government recognizes that this relief would be "drastic", but fails to show any necessity for such extreme relief, citing as its only authority in support thereof the *Hartford-Empire* case, now *in gremio legis* here. Whatever may be said as to the propriety of the relief there, that was a monopoly case, where the Court found willful and persistent violation of law, and this is not. We know of no authority in a non-monopoly Sherman Act case for any such relief as is contended for by the Government. Furthermore, the record does not put this Court in a position to determine what relief would be actually necessary or appropriate if this Court should take a different view of the manufacturing agreement than did the District Court. If the Court should reverse on this point, the proper course would be to remand to the District Court to consider the scope of relief and, if necessary, to take further testimony on that question. See *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532-3 (1924); *Continental Insurance Company* v. *United States*, 259 U. S. 156, 166, 173, 174, 182 (1922); *United States* v. *Reading Co.*, 228 U. S. 158, 160 (1913).

the Court should it wish to consider this evidence. Not only are these matters beyond the scope of this appeal as defined by the questions presented and specification of errors to be urged* (Govt. Br. pp. 2-3, 22-3), they and their proposed implications, together with conflicts in the testimony offered by the Government, were all fully considered** and disposed of by the trial court in its findings of fact (R. 52). This Court has pointed out that findings of fact are particularly important in an anti-trust case, such as this one, which comes to this Court on direct appeal from the trial court. *Interstate Circuit* v. *United States,* 304 U. S. 55, 56-7 (1938).

Although the Government thus adverts to details of evidence offered for the purpose of showing conspiracy, rejected as insufficient for that purpose by the trial court and upon which findings adverse to the Government were made, it does not now attack any of the findings to which this evidence might be germane. Since no claim is now made that the findings are not supported by substantial evidence, they will be accepted here. Rules of Civil Procedure, § 52(a); *Great Atlantic & Pacific Tea Co.* v. *Gros-*

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*Rules of the Supreme Court No. 27; *Cf. Eastman Kodak Co.* v. *Southern Photo Co.,* 273 U. S. 359, 369 (1927); *I. T. S. Rubber Co.* v. *Essex Rubber Co.,* 272 U. S. 429, 431-2 (1926); *Rowe* v. *Phelps,* 152 U. S. 87 (1894). Incidental reference in a brief to questions not properly raised is not sufficient. *Pennsylvania Railroad Co.* v. *Public Utilities Comm.,* 298 U. S. 170 (1936); *New York* v. *Kleinert,* 268 U. S. 646 (1925).

**In addition to the detailed findings made by the trial court covering all important aspects of Bausch & Lomb's relationship with Soft-Lite, the Government's version of the evidence was fully presented for consideration by the trial court not only in the Government's briefs but also by the lengthy proposed findings of fact and conclusions of law which it submitted (R. 38-51).

jean, 301 U. S. 412, 420, 421 (1937); *Borden's Co.* v. *Ten Eyck*, 297 U. S. 251, 261 (1936); *Adamson* v. *Gilliland*, 242 U. S. 350, 353 (1917).

Accordingly, it appears to be unnecessary for the Court to consider these isolated and unrevealing fragments of the evidence, most of which are torn from their matrices, since under the circumstances the Court will not, of course, attempt to review the evidence. *United States* v. *United Shoe Machinery Co., supra*, 37-8; *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. (2d) 891, 894 (C. C. A. 7th, 1941); *Anglo California National Bank* v. *Lazard*, 106 F. (2d) 693, 703 (C. C. A. 9th, 1939), *cert. denied*, 308 U. S. 624.

We do not understand the Government to contend that the matters included in the selected references to its versions of some of the evidence make the otherwise valid manufacturing agreement illegal. No contention was made below on any other ground than that the manufacturing agreement was invalid as a part of the distribution conspiracy or standing alone, and not having been made or considered there, this Court would be inhospitable to consideration of such a contention if made here.* But if such an argument is made or considered, the analysis in Point II will show that it is without substance or support in the record.

Upon the findings in this case, the judgment of dismissal in favor of the Bausch & Lomb defendants must be affirmed.

**Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 484 (1938); *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 498 (1937); *Minnich* v. *Gardner*, 292 U. S. 48, 53 (1934); *Duignan* v. *United States*, 274 U. S. 195, 199-200 (1927).

POINT II

THE SELECTIONS FROM THE EVIDENCE IN THE GOVERNMENT'S BRIEF, IF CONSIDERED, DO NOT FURNISH ANY BASIS FOR OVERTURNING THE DECISION OF THE TRIAL COURT THAT THE MANUFACTURING AGREEMENT IS VALID.

Despite their failure to challenge here the findings and conclusions below which establish that the Bausch & Lomb defendants did not participate in the conspiracy of the Soft-Lite defendants found below, Government counsel advert to portions of the evidence offered on that issue. While the limited nature of the review permitted here, which we have pointed out, seems to make these references mere burdensome surplusage, we submit our comments on them, believing, however, that the Court should not and need not consider this evidence.

The preface to the Government's Statement, that "the evidentiary facts are not in substantial dispute" (Govt. Br. p. 6) rather glosses over conflicts in the Government's evidence. Among the witnesses called by the Government were some who undertook to contradict other evidence in the case adduced by the Government. One Government witness, Wahlgren, was heavily relied on by Government counsel at the trial to connect the Bausch & Lomb defendants with the distribution conspiracy. Aside from its conflict with other testimony and its generally unsatisfactory character, his testimony was shown to be profoundly biased, and it appeared that, in previous litigations with Bausch & Lomb, his conduct in dealings with it and

his veracity had been the subject of sharp adverse judicial comment.* Thus there was some conflict in the evidence; the trial court was required to resolve it, and most of the findings, including those rejecting the Government's claim that the Bausch & Lomb defendants participated in the distribution conspiracy, involved the usual processes of adjudication on conflicting evidence. So, at the outset, it is fair to say that consideration of some of the selections from the evidence would embark the Court on the task of substituting its appraisal of the conflicting testimony for that of the trial court, a task which the Court, of course, will not undertake.**

The Government's brief says that the contacts between the parties have been varied and close (Govt. Br. pp. 17-18), that there were price discussions between Bausch & Lomb and Soft-Lite (pp. 18-19) and that Bausch & Lomb insisted that reductions in its price to Soft-Lite be passed on to wholesalers and retailers (p. 19), statements so summary that they elide and throw out of focus the findings and the business contexts which the trial court had before it. While the trial court found generally that the relationship of the parties was close and cordial and that there were numerous discussions and correspondence between them on various matters (Finding 18, R. 55), it recognized that this

*R. 297-302. See *Bausch & Lomb Optical Co.* v. *Wahlgren*, 1 F. Supp. 799 (N. D. Ill. 1932), *aff'd*, 68 F. (2d) 660, *cert. denied*, 292 U. S. 639; see *Wahlgren* v. *Bausch & Lomb Optical Co.*, 77 F. (2d) 121 (C. C. A. 7th, 1935), *cert. denied*, 296 U. S. 603.

**The advantage and proper sphere of the trial court in such matters is so familiar as to require no argument. See *United States* v. *United Shoe Machinery Co.*, *supra*, 37-8; *McDaniel* v. *United States*, 108 F. (2d) 450, 452 (C. C. A. 7th, 1939).

was an inevitable and innocuous incident of friendly commercial relations between supplier and customer.*

After it had considered all aspects of the relationship between the two companies, developed in meticulous detail by Government trial counsel, the trial court found, as it was bound to do, that the relationship was free of illegality, and that Bausch & Lomb had no connection with the Soft-Lite distribution system and played no part in its operation or maintenance (Finding 32, R. 58). The court below found that the entire evidence fell far short of showing conspiracy. It falls equally short of giving some other fillip to the manufacturing agreement (not asserted below) which can make it germane to the limited scope of the present appeal.

The incompleteness of the Government's reference to price discussions shows how far afield such references, irrelevant to the subject matter of the appeal, must lead if the actual state of the record on the subject is scrutinized. There undoubtedly were discussions between Bausch & Lomb and Soft-Lite concerning the prices at which Bausch & Lomb would sell Soft-Lite lenses to Soft-Lite Company and certain other price problems (Findings 18, 29, R. 55, 57). The changing specifications and characteristics of the lenses and the large number of types and sizes needed to fill all possible prescriptions required communications to a greater extent than would be necessary in the case of a standard product. These discussions occurred when Soft-Lite requested technical advice (R. 232, 600-601) in con-

*As the trial court commented: "But the law does not require hostility even between acknowledged competitors. *Maple Flooring Manufacturers Assn.* v. *U. S.*, 1925, 268 U. S. 563." (45 F. Supp. 399, R. 35-6).

nection with the introduction of new lines of lenses (*e.g.*, see R. 370-71, 619) and when downward revisions of prices from Bausch & Lomb to Soft-Lite were being considered (R. 599).

The extreme complexity of any price list for a complete line of ophthalmic lenses (R. 604-5, 619-23), necessarily existing at every stage of the distribution process (R. 604-5, 617), made it only natural that Singer, being comparatively inexperienced (R. 290, 598, 599-600, 605, 617), would seek the advice of Bausch & Lomb's experts (R. 600) and that such discussions and exchanges of information, advice and suggestions would and did occur.

On each occasion when a revision (always downward) of prices of lenses from Bausch & Lomb to Soft-Lite* was contemplated, Bausch & Lomb insisted that Singer pass the reduction on** (R. 598-9, 603-4; Govt. Ex. 121, R. 828, 387). If not passed on, a reduction in Bausch & Lomb's

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*There was naturally some relation between Bausch & Lomb's price formula on pink-tinted lenses sold to Soft-Lite and Bausch & Lomb's prices on white or untinted lenses, which were made in parallel ophthalmic classifications, types and forms (see Govt. Br. ftn. p. 19). Even before defendant Singer went into the optical business it was customary to quote the price for tinted lenses as an extra over white lenses (R. 540-41, 580).

**The reference in the Government's brief (p. 19) to the statement in Soft-Lite's advertising that "Both our Company and the Bausch & Lomb Optical Company have cooperated substantially in the expectation that these price adjustments will materially increase your total sales through substantially increased stock business" (Govt. Ex. 102, R. 808, 227), obviously refers merely to the fact that prices had been reduced by both companies (R. 228, 543-4). References to price discussions in connection with prices on certain advertising items (Govt. Br. p. 20), need no comment. They did not bear on the issues tendered here and were wholly unrelated to the manufacturing agreement.

price would benefit only Soft-Lite Company at Bausch & Lomb's expense. Bausch & Lomb could benefit from its reduction only through increased distribution. It had a proper interest in obtaining maximum sales and its only outlet for pink-tinted glass was through its sales to Soft-Lite. Such normal commercial concern that reductions should not produce lop-sided results reflected in no way on the manufacturing agreement.

Even on the occasions when there were discussions concerning prices and when Bausch & Lomb insisted on the general policy of passing on price reductions, judgment as to actual prices charged by Soft-Lite was always exercised by Singer and the Soft-Lite Company (R. 231-2, 375, 604, 612) and not by Bausch & Lomb (R. 611-12).* The Sherman Act permits businessmen to seek and receive intelligent and experienced advice and suggestions, and it does not then require that such advice be consistently disregarded. See *United States* v. *Armour & Co.*, 48 F. Supp. 801, 806 (W. D. Okla. 1943); *United States* v. *M. Piowaty & Sons*, 251 Fed. 375, 377 (D. Mass. 1917). So, if the Government's tangential reference to price discussions arouses interest, examination will reveal the correctness of the ruling below and that the references can have no purpose other than to attack indirectly and improperly findings and conclusions upon which a direct attack must have been thought by Government counsel to be quite hopeless.

Equally unrewarding is analysis of other aspects of the relationships touched upon. Although the record re-

*On one occasion, in spite of Bausch & Lomb's policy, Soft-Lite did not pass on a price reduction (R. 613, 621). If Soft-Lite subsequently communicated its decisions on prices to Bausch & Lomb, it was only for information (see R. 614, 622)

flects a few isolated exchanges of information between Bausch & Lomb and Soft-Lite regarding wholesalers and retailers (see Finding 18, R. 55), the finding of the trial court that "Bausch & Lomb has not agreed with Soft-Lite with respect to its selection, rejection, or discontinuance of relations with its wholesale customers or retail licensees" (Finding 32, R. 58), and that appointment as a retail licensee "did not require the approval of Bausch & Lomb" (Finding 13, R. 54) so clearly accords with the evidence that it is unnecessary to dissect the Government's present indirect attempt to reargue its claim, in support of the rejected conspiracy charge, that Bausch & Lomb participated in the selection or removal of Soft-Lite wholesalers or retail licensees* (Govt. Br. p. 20).

Below, the Government also attempted, without success, to show that Bausch & Lomb assisted in the development and carrying out of the Soft-Lite distribution system by making various changes in the original manufacturing agreement. Actually there was no change from the original intention of the parties. From the very first it was Singer's understanding and expectation that Soft-Lite was to have

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*Under its established policy Soft-Lite did not sell to wholesale branches of American Optical Company (R. 136; Govt. Exs. 18, 21, 22, R. 655-7, 136, 140-41) because that company manufactured and distributed a pink-tinted lens of its own in active competition with Soft-Lite (R. 476) and so could be expected to neglect and disparage Soft-Lite lenses. Nor did it sell to wholesalers who did a mail order business with unregistered optometrists (R. 131), or who had falsely advertised that they sold Soft-Lite lenses (Govt. Exs. 16, 17, 173, R. 654, 916, 136, 432), or who specialized in inferior goods (R. 130). These policies were the result of Soft-Lite's independent business judgment (see Finding 32, R. 58).

the distribution of all Soft-Lite lenses in whatever form or combination they might be made up (see R. 104-5, 157). All subsequent arrangements with respect to the distribution of Soft-Lite glass in any form merely carried out this intent.* Although the court below referred to certain "changes" in the manufacturing agreement (Finding 9, R. 53), these were merely amplifications of the original intent of the manufacturing agreement which were occasioned from time to time by further developments in the use of Soft-Lite glass. Thus, on July 6, 1932, Bausch & Lomb wrote to Soft-Lite recognizing its right to have the exclusive distribution of the new Nokrome** lenses when made of Soft-Lite glass on the same terms as originally agreed upon (Govt. Ex. 5, R. 641, 104). Such changes, to apply the agreement to new developments within its spirit, did not affect adversely the initial legality of the agreement.

As part of his promotional efforts, without consultation with and apparently without the knowledge of Bausch & Lomb (R. 156-8, 187), Singer put into effect certain reciprocal privileges among Soft-Lite, Panoptik and Orthogon

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*The Government mentions (p. 18) certain evidence regarding arrangements for disposal of second quality Soft-Lite lenses in foreign countries (although foreign commerce is beyond the scope of the compiaint (rulings of trial court, R. 115-16, 406-9, 425)), overlooking the fact that at no time were such seconds sold in the United States (R. 553). If the agreement for supplying Soft-Lite lenses exclusively to Soft-Lite company is valid, as it surely is, then an agreement by Soft-Lite to take only first quality lenses would be equally unobjectionable, regardless of whether those below first quality were destroyed at the factory, distributed outside the United States or disposed of in any other manner.

**A fused bifocal lens made under patents owned by Bausch & Lomb.

licensees* (see Govt. Br. pp. 11-12) by which, for example, a Panoptik licensee was permitted to receive Panoptik Soft-Lite lenses without making formal application to become a Soft-Lite licensee** (Finding 19, R. 56; Govt. Ex. 37, at p. 17, R. 681, 154; R. 157-8, 183-5). These privileges were relied on at the trial as evidence of Bausch & Lomb's participation in the distribution conspiracy and, like all other evidence offered on that issue, were rejected by the trial court as inadequate to sustain the charge. The Orthogon and Panoptik wholesale and retail licenses have long since been terminated.*** Extension of these privileges by Soft-Lite could not, in the context of the record, condemn the manufacturing agreement,

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*Panoptik bifocal lenses are made under patents exclusively licensed to Panoptik Company, Inc., a wholly owned subsidiary of Bausch & Lomb. Orthogon lenses are a series of marginally corrected lenses made under patents owned by Bausch & Lomb.

**No rights under the Orthogon and Panoptik patents were in any manner invaded or surrendered (R. 157-8). The respective Orthogon and Panoptik licensees merely received the right to handle in Soft-Lite, as well as in white, patented lenses which they were already licensed by the holders of the patents to deal in. No person could deal in Panoptik lenses in the Soft-Lite form or otherwise unless licensed under the Panoptik patents and Soft-Lite dealers not licensed under the Orthogon patents could handle Orthogon Soft-Lite lenses in uncut form only (R. 158, 543) (which required no further surfacing operations under the Orthogon patents (R. 543)).

***Notices of discontinuance of all Panoptik licenses were sent out in August, 1942 pursuant to an injunction contained in a partial summary judgment entered without opposition by the defendants in *United States* v. *Bausch & Lomb Optical Co., et al.*, Civil Action No. 10-394, (Unreported) (See C. C. H. T. R. Ct. Dec. 1941-3, par. 52,916) on July 20, 1942, in deference to the decision in *United States* v. *Univis Lens Co.*, 316 U. S. 241 (1942). By letter dated June 2, 1942 the Anti-Trust Division was notified that notices had been sent out under date of May 27, 1942 cancelling all Orthogon licenses.

Reference to steps taken by Bausch & Lomb with manufacturing licensees in accordance with the licenses and its legal rights under its Nokrome patents (Govt. Br. p. 18) to prevent the licensees from using their rights under the patents to affect adversely Bausch & Lomb's sales of Soft-Lite lenses made under the patents are equally unrevealing. These trivia were part of the evidence offered on the distribution conspiracy, where the trial court's decision stands unchallenged.

The remainder of the evidence referred to by the Government concerns chiefly the six wholesale optical companies in which Bausch & Lomb acquired majority stock interests between 1925 and 1932* (R. 85-6). Evidence with respect to them was offered at the trial on the theory that, failing direct evidence, by disregarding corporate entity, their activities might vouch Bausch & Lomb into the distribution conspiracy. The court below correctly rejected this approach, which appears to be abandoned along with any attack on the findings and conclusions on this subject below (*Cf.* Govt. Br. p. 42). The tack now is that, recognizing their separate entities, the relationship somehow infected restrospectively the manufacturing agreement *made in 1924* before the acquisition began. There is, of course, no claim or evidence whatever that the acquisition bore any relationship to the agreement between Bausch & Lomb and Soft-Lite. It is several times stated, although this too is irrelevant, that Bausch & Lomb "controls" the affiliates

*For convenience these companies are referred to as "affiliates" of Bausch & Lomb, but this word carries no overtones of support for the Government's claims.

(Govt. Br. pp. 41, 42), a conclusion which the record, if examined, would not bear out.*

Upon the trial Government counsel stated that the acts of any wholesaler who benefited by the alleged conspiracy could be proved against Bausch & Lomb (R. 199), but the trial court pointed out the necessity of establishing the connection between such acts and the conspiracy alleged against Bausch & Lomb (R. 114) and of proving that the acts were done pursuant to the conspiracy (R. 273-4). Now the Government relies upon the even more tenuous argument that the matters to which it refers are "surrounding circumstances" to be considered in appraising the reasonableness, and hence the validity, of the manufacturing agreement (Govt. Br. p. 42) but the necessity of connection remains and it is not supplied here any more than it was below.

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*The only evidence on this point is a stipulation that "Bausch & Lomb, through its ownership of a majority of the outstanding voting stock of each of said wholesale companies, has power to coordinate and control the sales and pricing policies of said wholesale companies." (Exhibit 206, R. 954, 628). The record is devoid of any evidence that Bausch & Lomb exercised its power of control, much less that control was exercised pursuant to any conspiracy or in support of the Soft-Lite distribution system. The mere fact of stock ownership with consequent power to control does not create substantial identity. *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98 (1909); *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737 (C. C. A. 8th, 1909); *Cf. United States* v. *E. I. Du Pont de Nemours & Co.*, 188 Fed. 127 (C. C. Del. 1911), *decree modified*, 273 Fed. 869 (D. C. Del. 1921). There was no claim that the *acquisition* of such stock interest was part of the conspiracy alleged or was in any way related to Soft-Lite; nor is there a scintilla of evidence to that effect. In view of the importance of the wholesaler in completing certain finishing operations (R. 428-9, 531) and of the high standards of both Bausch & Lomb and Soft-Lite (R. 129), it is only natural that they would be interested in and deal with some of the same high-class wholesale companies (R. 86).

Although there is no evidence in the record which even suggests that the affiliated wholesalers played any peculiar or special part in the Soft-Lite distribution system (if that question were now open here), the Government seems to attempt to raise such an inference by its incorrect statement that the wholesalers primarily consulted by Soft-Lite concerning its prices and policies were the affiliates (Govt. Br. p. 12 ftn. 10) and by its comments on the fact that a large part of Soft-Lite's sales were through the affiliates (Govt. Br. p. 20). The incorrectness of these inferences appears from the findings. The relationship of the affiliated wholesalers to Soft-Lite and their participation in the Soft-Lite distribution system were found to be exactly the same as that of the more than one hundred independent wholesale customers of Soft-Lite (Finding 28, R. 57; Deft. Ex. CC, R. 1007, 539). Therefore, it is impossible to argue that the status or activities of the affiliates were affected by, or were the result of, the manufacturing agreement or their affiliation with Bausch & Lomb.*

All of the affiliates or their predecessors were customers of Soft-Lite's predecessor, Optical Service Corporation, buying substantial percentages of its output before its first contacts with Bausch & Lomb in 1924 (Govt. Exs. 1A, 33, R. 635, 665, 101, 150; R. 89-90, 149-50, 485). From the very beginning, Singer, Optical Service Corporation and

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*Since there was nothing distinctive in the relationship of the affiliates to Soft-Lite and the acts of the affiliates have in no way been shown to be attributable to Bausch & Lomb, the Government's statement that "As to two-thirds of Soft-Lite's business, therefore, Bausch & Lomb is, in substance, both manufacturer and distributor;—" (Govt. Br. p. 21) is based upon a disregard of corporate entity which the court below properly rejected and which the Government elsewhere disclaims (Govt. Br. p. 42).

its successor, Soft-Lite Company, treated all wholesalers exactly alike (R. 473, 486, 542). The affiliates, like other wholesale customers of Soft-Lite, sell not only Soft-Lite lenses but the products of Soft-Lite's competitors as well (Finding 31, R. 57-8; R. 542). Singer met, addressed and consulted with all wholesalers indiscriminately (R. 404, 457-8, 482, 485-6, 555-8, 578).

When the Soft-Lite distribution system was introduced in 1933, it was fully explained to all wholesalers (R. 489), and thereafter the recommendations of all of them, whether affiliated or independent, with respect to the appointment and cancellation of retail licenses were generally followed (R. 217-18, 489, 542). The Government itself recognizes (Govt. Br. pp. 20-21) that the proportion of evidence which involves affiliates is largely attributable to their size and importance in the industry. There is ample evidence, overlooked in the Government's brief, of participation by independent wholesalers to justify the inference that their participation in the system was a common and regular occurrence.* Against this background the references to the affiliates are no more a basis for challenge of the manufacturing agreement than they were a basis for a result different from the presently unchallenged conclusion of the trial court on the alleged distribution conspiracy.

The references to parts of the record, foreign, we believe, to the subject matter of this appeal, appear upon

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*See Govt. Exs. 74A, R. 791b, 206; 74H, R. 791i, 206; 77, R. 793a, 207; 77B, R. 793c, 208; 77C, R. 793d, 208; 88C, R. 799e, 214; 88D, R. 799f, 214; 88E, R. 799g, 214; 88F, R. 799h, 214; 88G, R. 799i. 214; 92, R. 802z, 217; 153, R. 864a, 417; 179B, R. 920c, 433; 179C, R. 920d, 433; 179D, R. 920e, 433; 179F, R. 920g, 434; 179H, R. 920i, 434; 179J, R. 920k, 434; 179K, R. 920l, 434; 179M, R. 920n, 434.

scrutiny to be incomplete and inadequate and to have no bearing at all on the sole question before the Court—the validity of the manufacturing agreement. Their only bearing is upon the distribution conspiracy, upon which review is not now sought. The Government did not contend below that this evidence invalidated the manufacturing agreement. So, if that point is now thought to be made here and, though not made below, is considered, it has only its novelty to commend it, for whether viewed alone or with any twist of the kaleidoscope of the record, that agreement was, as the court below held, plainly valid.

CONCLUSION

The judgment dismissing the complaint against these appellees should be affirmed.

Respectfully submitted,

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APPENDIX

Act of July 2, 1890, as amended (26 Stat. 209, 36 Stat. 1167, 50 Stat. 693)

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes', approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. * * *"

"SECTION 3. Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or

commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. * * *"

"SECTION 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this act; * * *"

SUPREME COURT OF THE UNITED STATES.

Nos. 62 and 64.—October Term, 1943.

The United States of America, Appellant, vs. Bausch & Lomb Optical Company, M. Herbert Eisenhart, Ben A. Ramaker, Joseph F. Taylor, Soft-Lite Lens Company, Inc., Nathaniel Singer, and R. G. Landis.	Appeal from the District Court of the United States for the Southern District of New York.
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Soft-Lite Lens Company, Inc., Nathaniel Singer, and R. G. Landis, Appellants, vs. The United States of America.	
64	

[April 10, 1944.]

Mr. Justice Reed delivered the opinion of the Court.

The United States of America brought suit in the District Court for the Southern District of New York against the Bausch & Lomb Optical Company, a corporation, and the Soft-Lite Lens Company, Inc., and several of the chief officers of each, to restrain violations of the Sherman Act. Jurisdiction was conferred on the trial court by Section 4 of the Act (15 U. S. C. § 4) and upon this Court by Section 2 of the Act of February 11, 1903 (15 U. S. C. § 29 and Judicial Code § 238).

The complaint alleged that Bausch & Lomb and Soft-Lite and their officers contracted, combined and conspired to restrain trade in pink tinted lenses for eyeglasses, contrary to Sections 1 and 3 of the Sherman Act.[1] The allegations of the complaint were upheld by the trial court as to Soft-Lite and certain of its officers and dismissed as to Bausch & Lomb and its officers. *United States v. Bausch & Lomb Optical Co.*, 45 F. Supp. 387.

[1] 26 Stat. 209, as amended, 50 Stat. 693:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements pre-

The findings and opinion upon which the decree is molded show that Soft-Lite is the sole distributor of pink tinted lenses sold under the trade name "Softlite." Their plan of dealing follows. As no patents or secret processes are relied upon and as Soft-Lite limits itself to distribution only, the trade name, salesmanship and business experience of Soft-Lite are the qualities upon which it must primarily depend for its profits as a distributor. Soft-Lite buys its lenses from Bausch & Lomb. It sells to wholesalers, who in turn sell to retailers, who in turn sell to the public. Laying aside the variations in operating costs of wholesalers as compared with other wholesalers and of retailers as compared with other retailers, the opportunity for profits which can be divided between Soft-Lite, the wholesalers and the retailers, depends upon the difference between the price per lens that Soft-Lite pays Bausch & Lomb and the price the ultimate consumer pays the retailer. A wider spread between original purchase and final prices, which is maintained by artificial fixing of the prices demanded from the ultimate consumer, furnishes the links of the distribution chain more profit for division among themselves. This is true regardless of volume or price although these factors, of course, affect the aggregate profits available for division among the dealers who have a part in distribution. In its self-restricted field, Soft-Lite is successful. Roughly speaking, for the years 1938, 1939 and 1940 in the United States it has sold one-third of the pink tinted lenses for one-half of the gross receipts. Other manufacturers than Bausch & Lomb and other distributors than Soft-Lite do the remainder of the business.

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scribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. . . ."

Section 3 governs similar conduct in territories of the United States and the District of Columbia.

Soft-Lite has arrangements with Bausch & Lomb for the purchase from them of lenses and blanks, with wholesalers of optical glass for the supply of this material to retail opticians, and in turn with these retailers for sales promotion. This is an integrated plan for the distribution of Soft-Lite's optical specialty, the pink tinted glass for easing eye strain. The plan of distribution for this commodity has developed over more than a quarter of a century of experience.

The arrangement with Bausch & Lomb had its origin in 1924. At that time this manufacturer of optical glass undertook to grind pink tinted lenses for Soft-Lite out of foreign glass imported by the latter, but very soon the two parties arranged for Bausch & Lomb to manufacture the glass as well. At the very beginning Bausch & Lomb agreed that any orders for pink tinted lenses which it might receive would be transmitted to Soft-Lite. A list of Soft-Lite customers, wholesale and retail, was furnished Bausch & Lomb. It appeared better to both seller and buyer to extend their arrangement by a contract in which Bausch & Lomb undertook to manufacture and sell pink tinted glass and lenses to Soft-Lite. To avoid the danger to Soft-Lite's business of indiscriminate selling by Bausch & Lomb of this pink glass specialty, Bausch & Lomb agreed that it would not sell pink tinted glass to lens manufacturers or pink tinted lenses to the optical trade. Soft-Lite buys exclusively from Bausch & Lomb.

The legal position of Bausch & Lomb and Soft-Lite is that of buyer and seller. Their relations through the years have been close, friendly and mutually satisfactory. Bausch & Lomb knows generally of the Soft-Lite distribution system, both as manufacturer for an active customer and as an owner of stock in wholesale optical goods companies, which subsidiary companies handled a large part of Soft-Lite's goods as jobbers. The officials of the two corporations carried on discussions and correspondence with respect to wholesale customers, retail outlets, prices, advertising policies, the standing of dealers, and general trade information. As to trade adjuncts for optical glass distribution such as cleaning cloths, lens cabinets, etc., Soft-Lite and Bausch & Lomb cooperated even to the extent of agreeing to charge identical prices for such marketing aids.

In 1926, the arrangement between Bausch & Lomb and Soft-Lite was given a somewhat more formal character by a letter of the manufacturer advising its customer as follows:

"Since the very beginning of our relations with you, in connection with this transaction, it has been understood that we would safeguard your interests in every way and it has never been our intention to make competition for you by either marketing a tinted lens of our own or producing similar tinted glass for other manufacturers and it is our intention to abide by this understanding.

"On the other hand, however, it is difficult to foresee the progress of science in producing glass possessing better properties than is obtainable at the present time and in that event we feel certain that you would not in any way desire to impede our progress in that direction.

"We hope that this may be sufficient guarantee to you that we do not wish to do anything that would look like competition in connection with the Soft-Lite and we naturally expect that your efforts in the sale of same will be continued as at present for an indefinite period unless by consent of both parties concerned a different arrangement is agreed upon.

Yours very truly,

BAUSCH & LOMB OPTICAL COMPANY.

"P. S. Tinted lenses such as Crookes, Fieuzal, Smoke, Amber, etc. which we are now manufacturing it is understood will not come under the above arrangement."

Minor variations in the plan have occurred since that letter. Bausch & Lomb patented a lens called "Nokrome." Soft-Lite was advised that when Soft-Lite glass was used in the Nokrome lens, Soft-Lite should have exclusive distribution. There were other patented lenses manufactured by Bausch & Lomb. Sometimes these lenses were ground from pink tinted glass and sometimes from other colors. Since these patented lenses were distributed by Bausch & Lomb under a licensee system, interference arose. Soft-Lite and Bausch & Lomb made mutually satisfactory adjustments so that their respective retailers might have some of the advantages of dealing in the Bausch & Lomb patented lenses ground out of Soft-Lite glass.

Again, Soft-Lite was released from its obligation to take second quality lenses and Bausch & Lomb agreed to sell them only in foreign countries where Soft-Lite had no offices and at prices acceptable to both Soft-Lite and Bausch & Lomb.

Reference has been made to the fact that Bausch & Lomb owned stock in optical wholesale companies which distributed Soft-Lite lenses and blanks. A stipulation stated that

"Bausch & Lomb, through its ownership of a majority of the outstanding voting stock of each said wholesale companies, has power to coordinate and control the sales and pricing policies of said wholesale companies."

These subsidiaries were acquired by Bausch & Lomb "at intervals subsequent to the original arrangement with Soft-Lite." They now are the largest outlet for Soft-Lite lenses, taking sixty per cent of Soft-Lite sales. They were substantial customers of Soft-Lite before they became affiliates of Bausch & Lomb. Soft-Lite is treated by its wholesale customers alike whether or not the customers are Bausch & Lomb affiliates. It is equally true that all wholesalers have cooperated with Soft-Lite in the development of its system.

Bausch & Lomb thus profited from the Soft-Lite business in two ways: first, by profit made in manufacturing and selling to Soft-Lite; second, by sharing, through stock ownership of wholesale distributors of Soft-Lite's goods, in the profits which lay between the Soft-Lite selling price and the consumer purchase price. Bausch & Lomb, the evidence shows, understood well as early as 1925 the advantages to itself through these subsidiaries of the Soft-Lite plan, which secured an increased profit for division among distributing agencies. As a consequence, Bausch & Lomb concerned itself with prices charged to wholesalers by Soft-Lite, discussed each step of the price mark-up from Soft-Lite up to the consumer, insisted that reductions in its prices to Soft-Lite should be passed along the distribution line, and through its affiliated corporations cooperated in the price arrangements and the elimination of undesirable retailers.

Soft-Lite's control of distribution did not cease with this sale of its goods to optical wholesalers. It sought as wholesale outlets distributors who were free from business alliances with Soft-Lite's competitors. It sold only to wholesalers who were willing to cooperate with its policy. These wholesalers it designated as dealers and sold its goods only through them. Soft-Lite's wholesalers were allowed to resell only to retailers who held licenses from Soft-Lite. When retailers were licensed, the wholesalers were notified that they were at liberty to sell to the specified retailer. On the cancellation of the license, the wholesalers were notified in writing that the retailer was no longer entitled to receive Soft-Lite lenses. If a wholesaler did business with unapproved retailers, it was excluded from Soft-Lite's list of designated wholesalers. The wholesalers were required to distribute with each pair of Soft-Lite lenses a numbered certificate called a "Protection Certificate." By this certificate the wholesale outlet for Soft-Lite lenses found in the hands of unlicensed retailers could be traced by Soft-Lite.

The wholesalers were told that the certificates were intended for this purpose. Soft-Lite indicated to the wholesalers the prices to be received by them from retailers by means of published price lists. Through these price lists, made available to wholesalers and retailers alike, the retailers could determine the prices wholesalers were to charge.

It was determined by the District Court (and this finding is without challenge) that Soft-Lite and the wholesalers understood that material deviation would result in the discontinuance of the offending wholesaler as an outlet.

Soft-Lite's plan of distribution was rounded out by its arrangements with the retail optical concerns. As we have just pointed out, the retailers knew from the published lists the prices the wholesalers were expected to charge them. The retailers were selected by Soft-Lite with care equal to that used in selecting wholesalers. Soft-Lite, in the words of its brief, was "manufactured and advertised as a quality product, Soft-Lite must be sold as such." "Ethical" retailer opticians and optometrists were sought. Those who quoted prices in their advertisements or operated as adjuncts to department or jewelry stores were frowned upon. Retail prices to consumers were not fixed by Soft-Lite. It seems to be admitted, however, that the retailer was required to maintain prevailing local price schedules. An application form dated February 1, 1939, for retail stock licensees calls for representations to that effect from the Soft-Lite representative recommending the application and the approval of a Soft-Lite wholesaler. This practice apparently applied to all retailers. The District Court found that retailers agreed to sell the lenses at prices prevailing in the locality and that Soft-Lite required retailers to sell the pink tinted lenses "at a premium over comparable untinted lenses."

Under its present system, Soft-Lite grants a revocable, exclusive and nontransferable "license" to the retailer to buy Soft-Lite lenses and lens blanks from "licensed" Soft-Lite distributors or wholesale "licensees" and to resell the lenses at prevailing prices in the locality where the retailer is located. In turn, the licensee agrees to promote the sale of Soft-Lite lenses and to do nothing to injure their prestige. The licensee was required to state that he understood that the substitution of other lenses for Soft-Lite would adversely affect that prestige. The licensee fur-

ther agreed to sell only under the trade names and mark of Soft-Lite and only to the consumer or patient.[2]

The retailer's agreement to conform to the license requirements was enforced by surveillance through Soft-Lite's salesmen and by cancellation of the retailer's license if he failed to abide by its terms. Wholesalers were notified of such cancellation.

The Miller-Tydings Act of August 17, 1937, 50 Stat. 693, amended the Sherman Act so as to permit minimum prices for the resale of a commodity which bears the trade mark of the distributor in states where contracts of that description are legal by statute so far as intrastate transactions are concerned, and beginning in 1940 Soft-Lite has entered into resale price maintenance contracts with a number of wholesalers, presumably in conformity with the Miller-Tydings Act. The District Court was of the view that these contracts "came into existence as a patch upon an illegal system of distribution of which they have become an integral part."

It is accepted by all parties that the transactions of Bausch & Lomb and Soft-Lite are in interstate commerce as the term "commerce" is used in the Sherman Act.

The judgment of the District Court determined that Soft-Lite and certain of its officers had contracted and conspired with optical wholesalers and retailers to violate the Sherman Anti-trust Act in the following particulars:

"(a) by entering into so-called 'license' agreements with optical retailers which fix the prices at which said retailers shall sell Soft-Lite lenses; (b) by entering into so-called 'license' agreements with optical retailers which provide that said retailers will sell such lenses only to the public; (c) by entering into agreements with wholesale customers which provide that the said wholesalers will sell Soft-Lite lenses and blanks only to retailers who are designated as 'licensees' by the defendant Soft-Lite Lens Company, Inc.; (d) by entering into agreements with wholesale customers which fix the prices at which said wholesalers shall sell Soft-Lite lenses and blanks; (e) by entering into 'Fair Trade' resale price maintenance contracts with said wholesalers as an integral part of the illegal distribution system of Soft-Lite blanks and lenses; and (f) by enforcing the agreements set forth in subdivisions (a) through (e) of this paragraph."

The judgment directs Soft-Lite to cancel its license agreements with retailers and its Fair Trade resale price maintenance con-

[2] In 1939 a change was made from the license agreement not to deal in any lens similar in tint, color or shade to Soft-Lite lenses. The change followed an agreed order of the Federal Trade Commission of June 23, 1938, Docket No. 2717, In the Matter of Soft-Lite Lens Co., Inc.

tracts and agreements with wholesalers fixing prices and restricting their resales to Soft-Lite's retail licensees. Soft-Lite and its agents are enjoined from enforcing these contracts or using identification devices, such as the "Protection Certificates," for tracing resales of lenses or blanks purchased from Soft-Lite. They are likewise forbidden to enter into any other agreement similar in effect or purpose to those adjudged unlawful, except the Fair Trade contracts. These latter may be renegotiated after six months from the notices of cancellation which the judgment directs to issue. There is also a prohibition against Soft-Lite's and its officers' systematically suggesting resale prices on lens or blanks for said six months. Bausch & Lomb and various individuals are adjudged to be free of the violations which are charged in the complaint. The right to inspect records and to interview officers and employees is reserved to the Department of Justice in the manner set out below.[3] Finally, jurisdiction of the case is retained for further orders or directions, including modification or termination of any of the provisions as well as their enforcement. Cf. *Sugar Institute* v. *United States*, 297 U. S. 553, 605.

Two appeals are before us. The Government seeks to establish that the agreement of Bausch & Lomb not to sell pink tinted glass or lenses to any competitor of Soft-Lite and not to compete with Soft-Lite in the marketing of any pink tinted lens unreasonably restrains commerce in violation of the Sherman Act. By its appeal, the Government urges also a broadening of the decree by the substitution of a permanent instead of a six months' injunction against new Fair Trade agreements and against systematic

[3] "9. That for the purpose of securing compliance with this Judgment, authorized representatives of the Department of Justice, upon the written request of the Attorney General or an Assistant Attorney General, shall be permitted access, within the office hours of said defendants, and upon reasonable notice, to books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or the control of the said defendants, or any of them, relating to any of the matters contained in this judgment, such access to be subject to any legally recognized privilege. Any authorized representative of the Department of Justice, subject to the reasonable convenience of the said defendants, shall be permitted to interview officers or employees of said defendants without interference, restraint or limitation by said defendants: provided, however, that any such officer or employee may have counsel present at such interview. Said defendants, upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this Judgment as from time to time may be necessary for the purpose of enforcement of this Judgment; provided, however, that the information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party or as otherwise required by law."

suggestion of resale prices by Soft-Lite. It also asks an addition to the decree requiring Soft-Lite to sell its product without discrimination to any person offering to pay cash therefor.

The other appeal is by Soft-Lite and those of its officers who are enjoined. This appeal attacks the provisions of the judgment cancelling agreements of Soft-Lite with wholesalers to charge uniform prices to retailers, enjoining systematic suggestions of resale prices and execution of Fair Trade resale price maintenance contracts even for six months, and allowing future discovery by the Department of Justice in order to police the decree.

Since the alleged illegality of the Soft-Lite distribution system is the heart of the scheme which the Government attacks, we shall examine first the judgment from the standpoint of Soft-Lite's objections to it and then from that of the Government's desired additions as to Soft-Lite.

As the Court is equally divided upon the issue raised in the Government's appeal in No. 62 by its request for a reversal of the provision of the judgment which dismisses Bausch & Lomb and its officers from the proceeding, that provision stands affirmed.

I.

Our task of examining Soft-Lite's objections is simplified by the frank recognition of those appellants that "the retail license provisions binding dealers to sell at locally prevailing prices and only to the public constitute illegal restraints." Our former decisions compel this conclusion. Price fixing, reasonable or unreasonable, is "unlawful *per se*." *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 218; *United States* v. *Trenton Potteries*, 273 U. S. 392, 397; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458; *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 465. The retailer's price to his customer is the single source of stable profits for all handlers.

These illegal contracts cannot be considered, however, as happenings completely insulated from other incidents of the Soft-Lite distribution system. When we turn to the provisions of the decree which are attacked here by Soft-Lite, requiring it to cancel its resale price agreements with wholesalers as well as retailers and to avoid such requirements for six months either by contract or suggestion, and thereafter to act only in accordance with the Miller-Tydings Act, we must first note that it is plain that the arrangements for price maintenance in the wholesalers' sales to retailers are an integral part of the whole distribution system. Not only are Soft-Lite wholesalers carefully selected and coop-

erative but they may sell only to Soft-Lite's retail licensees. Undesirable wholesalers are excluded from the system and the District Court found that by means of published wholesale price lists, put in the hands of wholesalers and retailers alike, resale prices of wholesalers are designated by Soft-Lite. The requirement of the wholesalers' recommendation as to the business character of the applicant for a retail license, the evidence of espionage, the limitation of resales to Soft-Lite retail licensees, the existence of the "Protection Certificate" to mark the wholesaler who might violate the arrangement, the uniformity of the prices, as prescribed in Soft-Lite's published lists, which are charged retailers by wholesalers—all amply support, indeed require, the inference of the trial court that a conspiracy to maintain prices down the distribution system existed between the wholesalers and Soft-Lite through the years prior to this suit.

Soft-Lite is the distributor of an unpatented article. It sells to its wholesalers at prices satisfactory to itself. Beyond that point it may not project its power over the prices of its wholesale customers by agreement. A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 404. Even the additional protection of a copyright, *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 221, and cases cited, or of a patent, *United States* v. *Masonite Corp.*, 316 U. S. 265, 276; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, Nos. 54-55, 1943 Term, decided January 3, 1944, slip opinion page 3 and cases cited, add nothing to a distributor's power to control prices of resale by a purchaser. The same thing is true as to restriction of customers. *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 465; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 47-49; *Montague & Co.* v. *Lowry*, 193 U. S. 38, 45.

Not only do the appellants urge that conspiracy between Soft-Lite and the wholesalers should not be found from the foregoing evidence but they also say that they come within the scope of certain of our cases which are said to indicate that a simple refusal to sell to customers who will not resell at prices fixed by the seller is permissible under the Sherman Act. They cite *United States* v. *Colgate & Co.*, 250 U. S. 300; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 452-3; *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475-6; and *Fed-*

eral Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568, 582. None of these cases involve, as the present case does, an agreement between the seller and purchaser to maintain resale prices.

The *Colgate case* turned upon the sufficiency on demurrer of an indictment under the Sherman Act against a manufacturer for requiring its dealers to maintain prices. As the indictment was construed to allege only specification of resale prices by the manufacturer and refusal to deal with customers who did not maintain them, this Court held the indictment insufficient as no reference was made in it to a purpose to monopolize and in such a posture the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to deal." 250 U. S. at 302, 306, 307. Cf. *United States* v. *Schraders Sons*, 252 U. S. 85, 99.

The *Beech-Nut* case recognizes that a simple refusal to sell to others who do not maintain the first seller's fixed resale prices[4] is lawful but adds as to the Sherman Act, "He [the seller] may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade." 257 U. S. at 453. The Beech-Nut Company, without agreements, was found to suppress the freedom of competition by coercion of its customers through special agents of the company, by reports of competitors about customers who violated resale prices, and by boycotts of price cutters. *Idem*, pp. 451, 454, 455. As the decision as to the Curtis Company involved only selling agencies, 260 U. S. at 581, and that as to Sinclair the restricted use of a distributor's gasoline tanks, 261 U. S. at 474, they are inapplicable to a consideration of a refusal by a distributor to sell except to chosen dealers.

As in the *Beech-Nut* case, there is more here than mere acquiescence of wholesalers in Soft-Lite's published resale price list. The wholesalers accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees. That is sufficient. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226, 227; *United States* v. *Masonite Corp.*, 316 U. S. 265, 274-75; *Sugar Institute* v. *United States*, 297 U. S. 553, 601.

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[4] Cf. Robinson-Patman Act, § 1, 49 Stat. 1526.

So far as the wholesalers are concerned, Soft-Lite and its officers conspired and combined among themselves and with at least some of the wholesalers to restrain commerce by designating selected wholesalers as sub-distributors of Soft-Lite products, by fixing resale prices and by limiting the customers of the wholesalers to those recommended by the wholesalers and approved by Soft-Lite—all in violation of the Sherman Act. This finding justifies the order directing cancellation of the wholesale arrangements and cessation by Soft-Lite of systematic price suggestions. Whether this conspiracy and combination was achieved by agreement or by acquiesence of the wholesalers coupled with assistance in effectuating its purpose is immaterial.

Soft-Lite makes objection also to the clause of the decree which holds null and void certain resale price maintenance contracts entered into by Soft-Lite and many of its wholesalers after the passage of the Miller-Tydings Amendment to the Sherman Act on August 17, 1937, 50 Stat. 693. See note 1, *supra*. Objections on the same grounds apply to other clauses of the decree forbidding enforcement of these existing "Fair Trade" contracts with wholesalers and Soft-Lite's entering into any others until six months after certain notices of cancellation which are required by the decree but which have not yet been given owing to this appeal. Soft-Lite contends that the "Fair Trade" agreements are strictly within the terms of the Miller-Tydings Act and we assume the correctness of that position.[5] The disadvantage at which these clauses place Soft-Lite towards its customers and competitors is pointed out.

The District Court said that these contracts "came into existence as a patch upon an illegal system of distribution" and as an integral part of that system. As some wholesalers do certain cutting and edging work on the blanks for sale to retailers who do not do this grinding for themselves, the "Fair Trade" contracts for fixing resale prices apply only to those sales, known as "stock" sales, where the lenses and blanks are resold in the same form in which they come from Soft-Lite. See *United States* v. *Univis Lens Co.*, 316 U. S. 241, 253-54. We think that where a distribution system exists, prior to the making of such price maintenance contracts, which is illegal because of unallowable price

[5] See the decision below, 45 F. Supp. 387, 399. We do not understand the opinion of the District Court to impugn the validity of bilateral contracts, identical in form, between a producer or distributor, on the one hand, and their customers on the other, entered into under the Miller-Tydings Act.

fixing contracts and where that illegality necessarily persists in part because a portion of the resales are not covered by the "Fair Trade" contracts, as just explained, subsequent price maintenance contracts, otherwise valid, should be cancelled, along with the invalid arrangements, in order that the ground may be cleansed effectually from the vice of the former illegality. Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole. *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461. Cf. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61, 96, 470, 476-77; *Aikens* v. *Wisconsin*, 195 U. S. 194, 205-6.

The last objection brought forward by Soft-Lite to the decree is that paragraph 6, which is set out in full in note 3, is an unconstitutional exercise of judicial power by virtue of the provisions of the Fourth and Fifth Amendments or, at any rate, an improper use of the trial court's discretion.

The first sentence requires Soft-Lite to permit authorized representatives of the Department of Justice to have access to all records and documents of Soft-Lite which are in Soft-Lite's control, "relating to any of the matters contained in this judgment . . . subject to any legally recognized privilege."[6] The second sentence we construe to forbid Soft-Lite or its officers from directing its personnel to refuse to discuss with investigators of the Department the affairs of Soft-Lite relating to any of the matters contained in the judgment and from barring from their property investigators who may appear unprovided with search warrants. This second sentence purports to give no other right of investigation of the affairs of the appellants. The third and last sentence directs the defendants to submit on the written request of the Department such reports in writing "with respect to any of the matters contained in this judgment" as may be necessary to enforce it.

There is nothing in the United States Code relating to monopolies and combinations in restraint of trade which makes provision for such broad visitatorial powers. Without this statutory authority, United States officials could not require the corporation

[6] The wording of the sentence includes the papers of the individual defendants who are officers of Soft-Lite. The United States disclaims in its brief, page 55, so broad a meaning. We accept the suggested interpretation that the paragraph relates only to the papers belonging to the corporation. Cf. Wilson v. United States, 221 U. S. 361, 376-85.

to submit to this examination without a search warrant. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 356-58; *United States* v. *Louisville & N. R. Co.*, 236 U. S. 318, 329-38. Cf. *Guthrie* v. *Harkness*, 199 U. S. 148, 158. The provision was evidently sought and allowed to enable the Government to obtain information as to the operations of Soft-Lite subsequent to the judgment declaring Soft-Lite's distribution operations unlawful, to guide the responsible officials of the Department of Justice in their duty of protecting the public against a continuance of the illegal combination and conspiracy without the necessity of the expense and difficulty of extended investigation or renewed hearings under the jurisdiction retained for modification or enforcement. If reasonably necessary to wipe out the illegal distribution system, we see no constitutional objection to the employment by equity of this method. In the immediately preceding paragraphs of this opinion which discuss the power of the trial court to compel the cancellation of "Fair Trade" agreements, executed during and as a part of the unlawful distribution system, we cited important precedents of this Court which uphold equity's authority to use quite drastic measures to achieve freedom from the influence of the unlawful restraint of trade. These precedents are applicable here. The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions. Doubts are to "be resolved in favor of the Government and against the conspirators." *Local 167* v. *United States*, 291 U. S. 293, 299; *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532.

The Fifth Amendment does not protect a corporation against self-incrimination through compulsory production of its papers, *Wilson* v. *United States*, 221 U. S. 361, 375; *Hale* v. *Henkel*, 201 U. S. 43, 74-75; *Wheeler* v. *United States*, 226 U. S. 478, although it does protect an individual, *Boyd* v. *United States*, 116 U. S. 616. A corporation is chartered with special powers only. Its creator, the State, may examine into its records to see whether or not the privileges have been abused. Our dual form of government necessarily authorizes the United States to exercise these powers in the vindication of its own laws. *Hale* v. *Henkel*, *supra*. The *Boyd* case pointed out that, as to individuals, the extortion of his private papers by subpoena was not only compelling self-incrimination but was also an unreasonable search and seizure within the Fourth Amendment. 116 U. S. at 634. Upon further examination of the problem of the inter-relation of the two Amendments in *Hale* v. *Henkel*, 201 U. S. at 72-73, this Court reached the

conclusion that the Fourth Amendment was not intended to interfere with "the power of courts to compel, through a *subpoena duces tecum*, the production, upon a trial in court, of documentary evidence," so long as the scope of the subpoena was reasonable. The power of Congress to require disclosure of corporate documents, a question adverted in *Hale* v. *Henkel*, p. 77, but not decided, was upheld in *United States* v. *Louisville & N. R. Co., supra*. The scope of equity's power, Sherman Act, Sec. 4, 26 Stat. 209, to obviate continued restraint on trade in accordance with the Congressional direction as to the use of the injunction against violators of the Sherman Act is no more restricted in its field than that of Congress.

The appropriateness of the visitatorial remedy raises a different question. Of course, a mere prohibition of the precise scheme would be ineffectual to prevent restraints. *United States* v. *Freight Association*, 166 U. S. 290, 308. The circumstances of each case control the breadth of the order. *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, 436. The other provisions of the decree are important. If in the present case, Soft-Lite was required for the indefinite future to sell its goods to any buyer with cash to pay the purchase price, there would not be the same need for visitatorial powers. The first sentence of the provision of the decree under discussion compels the disclosure only of papers relating to the matters contained in the judgment. This we think is limited sufficiently to satisfy the rule as to necessary certainty. *Wilson* v. *United States, supra*. We cannot say that the first two sentences of the 9th paragraph of the decree, as herein construed, were beyond the discretion of the trial judge. We are of the view that the third sentence, relating to reports, is too indefinite for judicial enforcement and therefore improper. Cf. *Swift & Co.* v. *United States*, 196 U. S. 375, 400, 402.

II.

The United States seeks extensions of the decree as entered against Soft-Lite. In the Government's view the existing prohibitions, although coupled with the retention of jurisdiction for further orders or directions, including modification and enforcement, are insufficient to prevent continuance of the purposes and effects of the unlawful Soft-Lite distribution system. Specifically, we are asked to direct the inclusion of requirements that Soft-Lite file "with the district court a written instrument providing that it will sell its product, without discrimination, to any person offering to pay cash therefor."

The Sherman Act is intended to prevent unreasonable restraints of commerce. The Clayton amendment, 38 Stat. 731, outlawed agreements with customers which restricted the customer from dealing with the products of a competitor of the seller. Persons injured by unlawful restraints may recover threefold damages. The Federal courts have jurisdiction of suits to enjoin violations. Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices. In a business, such as Soft-Lite, which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service. We are, as the District Court apparently was, loath to deny to Soft-Lite this privilege of selection. *United States* v. *Colgate & Co.*, 250 U. S. 300, 307; *Fed. Trade Comm'n* v. *Raymond Co.*, 263 U. S. 565, 573. We have no reason to doubt that Soft-Lite will conform meticulously to the requirements of the decree. When it is shown to the trial court that it has not done so will be an appropriate time for the Government to urge this addition to the decree.

What we have just said as to the Government's request for a requirement of sales by Soft-Lite to all applicants for its commodities is relevant to the Government's other request for modification of the decree to make permanent the six months' prohibition against Soft-Lite's systematically suggesting resale prices on its lenses and the execution of resale price maintenance contracts under the Miller-Tydings Act. The path is narrow between the permissible selection of customers under the decision in *Colgate & Co.* and unlawful arrangements as to prices under this decree, but we think Soft-Lite is entitled to traverse it, after a reasonable interim to dissipate unlawful advantages, with such aid as Congress has given by the Miller-Tydings Act. The suggestion for a permanent injunction is unacceptable.

These conclusions lead us to modify the judgment by striking out the last sentence of paragraph 9, quoted in note 3. As so modified the judgment is affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.